In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1489

BALZAC BROTHERS, INC.,
APPELLANTS,

v.

WARING PRODUCTS DIVISION DYNAMICS OF AMERICA, et als.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

JURISDICTIONAL STATEMENT

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Opinions Below

The opinion of the district court subject of this appeal, dated February 3, 1976 (App. *infra*, pp. A-1 - A-27) is not yet reported.

The opinion of the Circuit Court of Appeals for the First Circuit, dated March 3, 1975 reversing an earlier dismissal

of the complaint by a single United States District Judge is unreported. (App. *infra*, pp. A-30 - A-31)

The opinion by a single judge of the District Court dated August 23, 1974 dismissing the complaint as not presenting a substantial constitutional question is unreported. (App. *infra*, pp. A-32 - A-35)

The initial order of the single United States District Judge dated January 29, 1974 refusing to convene a three-judge court on the grounds that the act attacked was so plainly unconstitutional that it did not warrant the convening of a three-judge court is unreported. (App. A-38 - A-40)

Jurisdiction

This is an appeal from the judgment of a special three-judge court convened pursuant to 28 U.S.C. Sections 2281 and 2284 which dismissed the complaint of plaintiff that had sought a Declaratory Judgment and Injunctive Relief against the enforcement of Rule 56 of Puerto Rico's Rules of Civil Procedure on the grounds that said rule violates the due process clause of the Constitution of the United States. The judgment of the District Court holding that Rule 56 satisfies the constitutional requirements of due process and that plaintiff is not entitled to the relief prayed for and further dismissing the complaint was entered on February 10, 1976. Plaintiff's notice of appeal was filed on February 19, 1976. (App. *infra*, p. A-29)

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1253. See *Calero Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 675, 676 (1974).

Constitutional Provisions and Statutes Invoked

The Fifth Amendment of the Constitution of the United States in its pertinent part provides:

> "No person . . . be deprived of life, liberty or property, without due process of law."

The Fourteenth Amendment of the Constitution in its pertinent part provides:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law, . . ."

Rule 56 of Puerto Rico's Rules of Civil Procedure provides:

> 56.1 *General Principles*
>
> In every action, before or after entering judgment, on motion of the claimant, the court may make such temporary order as may be necessary to secure the effectiveness of the judgment. The court may order the attachment, garnishment, the prohibition to alienate, the claim and delivery of personal property, receivership, an order to do or desist from doing any specific act, or it may adopt any other measure which it may deem advisable, according to the circumstances of the case, regardless of whether according to the previous proceedings, the remedy is ancillary to an action or must be obtained by an independent action. In every case in which a temporary remedy is sought, the court shall consider the interests of all the parties and shall enter judgment as substantial justice may require.
>
> 56.2 *Notice*
>
> No provisional remedy shall be granted, modified, set aside, nor shall any action be taken thereon without notice to the adverse party and a hearing, except as provided in Rules 56.4 and 56.5.

56.3 *Bond*

A temporary remedy may be granted without giving a bond if it appears from public or private documents signed before a person with authority to administer oaths that the obligation may be legally enforced, or if a remedy is sought after judgment is entered. In all other cases the court shall require a bond sufficient to secure all the damages caused to the defendant by reason of the remedy. A defendant or respondent may, however, retain the possession of the personal property attached by the plaintiff or claimant by posting a bond in such sum as the court may deem sufficient to secure the value of the property. The guaranteeing by the defendant of the sum attached shall render the attachment ineffective.

56.4 *Attachment or prohibition to alienate*

If the requirements of Rule 56.3 have been met, the court shall issue, on motion ex-parte of a claimant, an order of attachment or of prohibition to alienate. The attachment and prohibition to alienate real property shall be effected by recording them in the Registry of Property and notifying the defendant. In the case of personal property, the order shall be carried out by depositing the personal property in question in court or with the person designated by it under the claimant's responsibility.

56.5 *Order to do or to desist from doing*

No order shall be made under Rule 56 to do or to desist from doing any specific act without serving notice upon the adverse party, unless it appears clearly from specific facts supported by affidavit that the applicant will sustain irreparable injury, damage or

loss before notice and hearing on the application. Such order ex-parte shall be effective upon notice thereof. Any party affected thereby may at any time file a motion to modify or annul the order, and such motion shall be set for hearing at the earliest possible date but not later than 5 days after the filing thereof and shall have preference over all other matters. For the purposes of such hearing, a notice of 2 days to the party obtaining the order or a shorter notice allowed by the court shall be sufficient.

56.6 *Receivers*

No receiver shall be appointed unless it is shown no other temporary remedy would be effective to secure the effectiveness of the judgment. Unless otherwise ordered by the court a receiver shall proceed in accordance with the rules for the judicial administration of estates.

Question Presented

Whether Rule 56 of Puerto Rico's Rules of Civil Procedure violates the due process requirements of the Fifth and Fourteenth Amendments of the Constitution of the United States in authorizing in civil actions, where no final judgment has been rendered, the attachment of a defendant's property, ex-parte, without prior notice and hearing and without providing for an adequate and immediate post-attachment hearing.

Statement of the Case

On November 1, 1973 Balzac Brothers, Inc. (Balzac) a Puerto Rican corporation filed an action against Waring Products Division Dynamics Company of America (War-

ing) as well as against various judicial officers of the Commonwealth of Puerto Rico seeking a Declaratory Judgment and an Injunction against the constitutional validity of Rule 56 of Puerto Rico's Rules of Civil Procedure insofar as this rule authorizes the issuance of attachment orders ex-parte, without prior written [redacted] or hearing in cases where no final judgment has been rendered. Plaintiff requested the convening of a three-judge court pursuant to 28 U.S.C. Section 2284.

Balzac's action was prompted because of the fact that on that same day it had been served with an attachment order issued ex-parte, without prior notice or hearing, by Judge Flavio Cumpiano, Superior Court Judge of the Commonwealth of Puerto Rico at the request of Waring in an action for the collection of money in the amount of $10,000. The remedy was obtained pursuant to Rule 56 as a remedy to insure the collection of a judgment that might be rendered in the future. Balzac had not been notified of the attachment order and first knew about it when the marshal appeared at its premises to attach and take possession of Balzac's assets and merchandise which were for sale at Balzac's store. To avoid seizure of personal property and merchandise, Balzac's officers suggested to the marshal the attachments of Balzac's bank account. A loan was obtained and deposited in Balzac's bank account. The marshal then attached the funds in the bank account. The attached funds are to this date under the custody of the marshal. The action brought against Balzac is still pending trial.

On January 29, 1974 a single judge ruled that plaintiff's action for Declaratory Judgment and Injunction stated a cause of action under Section 2281 of 28 U.S.C. but that a three-judge court was unnecessary as the unconstitutionality of the statute was clear under *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (App. *infra*, pp. A-38 - A-40).

While the District Court was in the process of getting ready to rule on the merits, *Mitchell* v. *Grant*, 416 U.S. 600 (1974) was decided. The District Court under the influx of *Mitchell* v. *Grant, supra,* made a 180 degree turn and decided that Rule 56 was so plainly constitutional that the convening of a three-judge court was not warranted. The court dismissed the complaint.

On September 9, 1974, Balzac appealed said ruling to the United States Circuit Court of Appeals for the First Circuit. On March 3, 1975, the Circuit Court of Appeals reversed the ruling and ordered the convening of a special three-judge court. It found that the constitutional issue presented was substantially in the light of *North Georgia Finishing, Inc.* v. *DiChem, Inc.*, 419 U.S. 601 (1975).

The court was convened and after new argument and memoranda it issued its opinion finding that Rule 56 is constitutional. On February 9, 1976 judgment was entered dismissing the complaint.

The Question Is Substantial

The course of this litigation is the best evidence that this Honorable Court is confronted with a substantial question. What are the teachings of *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) pertinent to Rule 56 that seems to have been dispelled by *Mitchell* v. *Grant*, 416 U.S. 600 (1974) and *North Georgia* v. *Di-Chem, Inc., supra*? Specifically *North Georgia* is very similar on its facts and statutory set up to the case at bar. There the statute was found unconstitutional on the basis of *Sniadach* and *Fuentes*. Which are the attributes possessed by Rule 56 that make it consistent with due process and save it from the fate suffered by the Georgia statute?

Plaintiff's constitutional challenge to Rule 56 consists in that it allows, in violation of due process, that any judge in any civil action filed in the Commonwealth of Puerto Rico's courts may grant ex-parte, without prior notice or hearing an attachment order based only on the unsworn allegations of the complaint which contain, at the most, conclusionary allegations. This can be done even though no judgment has been rendered or trial has been had in which the plaintiff has tested the validity of his allegations. Furthermore, the statute does not provide for an immediate post attachment hearing in which the plaintiff will be required to prove the validity of his cause of action and the necessity of his action.

The court below considered that the saving characteristic of the Puerto Rico statute is that there is judicial supervision of the pre-judgment attachment so that a debtor "is not simply left at the mercy of his creditors and court functionaries charged with ministerial duties" (App. p. A-25) The court considered that the fact that a pre-judgment attachment cannot be obtained except by motion to the court who will make "a summary determination of the relative rights involved" (App. p. A-25) made the rule consistent with due process. It added further that in any event the defendant is entitled to a post-seizure hearing in which he can question the whole procedure. (App. p. A-26)

But the fact is that Puerto Rico's Rules of Civil Procedure incorporates the notice theory of pleading and accordingly the complaint contains only conclusory allegations. It should be further considered that the motion for attachment is not required to be sworn or to contain a specific and detailed presentation of the facts. This, in our opinion, renders such ex-parte, one-sided examination and summary determination by the court a very tenuous guarantee against mistaken deprivations. How a judge can,

only on the basis of pleadings of the party seeking the attachment, make a summary determination of the relative rights of the parties, is something that defies the imagination.

We have been unable to locate in the rules the mechanism to invoke an immediate post-attachment hearing. Simply there is none. The hearing authorized under Rule 56.5 is limited to cases where a temporary restraining order has been issued ex-parte on the basis of an affidavit of specific facts alleging that the applicant will suffer irreparable harm. It simply does not apply to attachment orders.

Conclusion

On the basis of the foregoing, the judgment of the District Court should be reversed. Otherwise, probable jurisdiction should be noted.

Filed April 15, 1976.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 960-73

BALZAC BROTHERS, INC.,
Plaintiff,
v.
WARING PRODUCTS DIVISION OF DYNAMICS
COMPANY OF AMERICA, et al,
Defendants.

OPINION AND ORDER

(Filed & Entered Feb. 3, 1976)

TOLEDO, J.

On March 3, 1975, the United States Court of Appeals for the First Circuit vacated the judgment entered on August 26, 1974 by the District Court dismissing the instant action on the merits without the convening of a three judge court. The Court of Appeals, expressly refraining from any judgment on the merits, held that in view of the decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), a case decided after the District Court's dismissal of the action, the complaint presented a substantial constitutional issue that under the standards of *Goosby* v. *Osser*, 409 U.S. 512 (1973), could not be decided by a single judge court.

The Court of Appeals accordingly remanded the case for the constituting of a three judge court and pursuant to this mandate and the provisions of Title 28, United States Code, Section 2284, a three judge court was convened on April 15, 1975. The parties having submitted a stipulation of facts and presented all desired argument on their respective briefs, the Court is now ready to issue its decision.

The factual background of the case is not complicated. On October 1, 1973, defendant Waring Products Division of Dynamics Company of America (Waring), sued herein plaintiff Balzac Brothers, Inc. (Balzac) in the Superior Court of Puerto Rico, San Juan Section, for the collection of the sum of $9,595.04 allegedly owed by Balzac for merchandise sold and delivered by Waring. Under case number 73-6743D and together with the complaint for the collection of the above amount, plus interest, costs and attorney's fees, Waring filed on that date a motion, pursuant to the provisions of Rule 56 of the Puerto Rico Rules of Civil Procedure, requesting an attachment of property to secure the effectiveness of the future judgment and a designation of the property of Balzac to be so attached.

On that same date, October 1, 1973, Balzac was served with a copy of the complaint and the summons, but not with a copy of the motion requesting the attachment of designated property. Three days later, an order authorizing the requested attachment upon the posting by Waring of a $10,000 bond was entered by Judge Francisco Espinosa.

Balzac made its first appearance of record through attorney Hector Oliveras on October 18, 1973. On that date, Balzac requested an extension of time to reply to the complaint and served interrogatories on therein plaintiff Waring. On October 31, 1973, no answer to the complaint having yet been filed by Balzac. Judge Flavio E. Cumpiano accepted the $10,000 bond posted by Waring in compliance with Judge Espinosa's Order of October 4, 1973 and issued an order of attachment of Balzac's property. The following day the Marshal of the Superior Court, San Juan Section, Nicolas Torres Renta, appeared at Balzac's warehouse to execute the attachment. Faced with the imminent attachment of its property, Balzac obtained

an immediate bank loan and deposited with the Marshal a check for $12,085.04 thereby avoiding the seizure of its property.

On that same date, November 1, 1973, Balzac filed the instant complaint and petition for declaratory judgment and injunction under Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343, 2201 and 2281. The action was also brought as a class action under Rule 23A of the Federal Rules of Civil Procedure on behalf of the class constituted by all the citizens residing in the Commonwealth of Puerto Rico that are being sued in the Puerto Rico Commonwealth Courts and against which orders of attachment have been obtained, or are being obtained, without a final judgment having yet been rendered in the legal proceedings in which they are defendants.

The First issue to be decided upon the vacating of the prior dismissal of the action and the subsequent stipulation of facts and argumentation by the parties was whether or not a plaintiff class should be certified in this action. On November 25, 1975, the Court denied certification of such a class, but there having as yet been no final decision rendered in civil case number 73-6743 in the Superior Court of Puerto Rico, San Juan Part, the case was not thereby rendered moot. Although plaintnff can not act in representation of a class, nevertheless, its constitutional attack on Rule 56 of the Rules of Civil Procedure of the Commonwealth of Puerto Rico must therefore be entertained by this Court.

In essence, plaintiff's claim is that said Rule 56, inasmuch as it provides for the granting of ex parte attachment orders without notice or hearing in cases where no final judgment has yet been rendered, is unconstitutional and in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and, further,

that its application to plaintiff in case 73-6743(d), where the attachment of plaintiff's property was ordered without a prior hearing and without prior notification of any kind, deprives plaintiff of its property without the due process of law.

At the outset we must point out that certification is not appropriate since the Supreme Court of Puerto Rico has already ruled on Rule 56. See *Ricardo Dominguez Talavera* v. *Tribunal Superior de Puerto Rico, Sala de San Juan, Hon. Osvaldo de la Luz Velez, Juez,* case number 0-73-344, decided September 12, 1974, Puerto Rico Bar Association advance publication service reference number CA78-1974. We will therefore proceed to consider plaintiff's action on its merits although, there existing procedural defects, the procedural aspects will be first.

The action, as originally filed on November 1, 1973, was brought against Waring, the Hon. Flavio E. Cumpiano, Marshal Nicolas Torres Renta, the Hon. Juan B. Ortiz Torrales as acting Court Administrator of the Commonwealth of Puerto Rico and the Hon. Pedro Perez Pimentel, Chief Justice of the Supreme Court of Puerto Rico, as Head and Administrator of the System of Courts of the Commonwealth of Puerto Rico. The complaint was amended on November 7, 1973 in order to specifically allege that the Hon. Pedro Perez Pimentel, in his official capacity of Chief Justice of the Supreme Court of Puerto Rico and Director of the judicial system of the Commonwealth of Puerto Rico, has the constitutional authority to order that Rule 56 of the Puerto Rico Rules of Civil Procedure cease to be applied in its unconstitutional aspects and that the Hon. Juan Ortiz Torrales, as acting Court Administrator, had delegated authority from the Chief Justice of the Supreme Court to do likewise, including the power to instruct all judges and marshals not to grant or carry out attachment orders granted ex parte without prior hearing or notification. Subsequently, these two parties were substituted by their successors in office, the Hon. Jose Trias Monje as Chief Justice of the Supreme Court of Puerto Rico and the Hon. Ramon Negron Soto as Administrative Director of Courts.

As previously stated, the action was brought under Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343, 2201 and 2281. Claiming that it did not have a remedy at law and would suffer irrevocable and irreparable harm unless an injunction be granted against the defendants to restrain the enforcement of the provisions of Rule 56, plaintiff prayed for injunctive relief as follows: against codefendant Nicolas Torres Renta ordering him not to carry out the attachment order signed by Judge Flavio E. Cumpiano; against codefendant Waring to prevent its attaching the property of plaintiff without a prior hearing and notice of the proposed action; against all judges of the Commonwealth of Puerto Rico barring them from issuing attachment orders in cases where there has been no final judgment rendered and, finally, against all marshals of the system of courts of the Commonwealth of Puerto Rico against proceeding in this case, and any other case, to execute an attachment order issued in those circumstances.

We must begin by pointing out that the Court can not grant injunctive relief against all the judges and marshals of the Commonwealth Courts for they are not parties to this action. Plaintiff asked for a certification of a plaintiff class but did not ask for a certification of defendant classes in order to make the requested injunctive relief possible against all the judges and marshals of the system of courts of the Commonwealth of Puerto Rico. Not having requested such certification, plaintiff failed to bring them as defendants in the suit. They have not been made subject to the

Court's jurisdiction and thus can not be enjoined by an order of this Court.

Turning now to a consideration of the parties which plaintiff brought as defendants we find that the suit must be dismissed with respect to codefendant Waring. It appears from the allegations in the complaint that codefendant Waring is a private firm doing business in the Commonwealth of Puerto Rico. No relationship between said codefendant and the Government of the Commonwealth is alleged which could form a basis for a conclusion that Waring's actions constitute state action for purposes of Title 42, United States Code, Section 1983. There is likewise no allegation that Waring conspired with state officers or otherwise acted "under color of law" to deprive plaintiff of federally protected rights. In short, codefendant Waring clearly can not in any way be considered an "officer" or "employee" of the Commonwealth of Puerto Rico and the mere fact that it has instituted an action in the Commonwealth courts and obtained a provisional remedy available under Commonwealth law to all similarly situated plaintiffs does not result in its being clothed with the authority of the state. Absent a specific charge of conspiracy with state officers, Waring is a private concern which can not be considered to have acted "under color of law" and is therefore not suable under Title 42, United States Code, Section 1983 and its jurisdictional counterpart, Title 28, United States Code, Section 1343.[1]

Codefendant Waring is likewise not subject to injunctive relief under Title 28, United States Code, Section 2281.

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[1] See e.g. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970); *United States* v. *Price*, 383 U.S. 787 (1966); *Fletcher* v. *Rhode Island Hospital Trust National Bank*, 496 F.2d 927 (1 Cir. 1974); *Stevens* v. *Frick*, 372 F.2d 378 (2 Cir. 1967), cert. den. 387 U.S. 920 (1970); *El Mundo Inc.* v. *Puerto Rico Newspaper Guild, Local 225*, 346 F. Supp. 106 (DC PR 1972); *Kerrigan* v. *Boucher*, 326 F. Supp. 647 (DC Conn. 1971), affirmed 450 F.2d 487 (2 Cir. 1971).

Said statute provides for injunctive relief only against state officers and jurisdiction over private parties can not therefore be established under its provisions. The wording of the statute is explicit: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute *by restraining the action of any officer of such State* in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes . . .". As we have already noted, there is no way in which Waring can be considered a "state officer" and therefore jurisdiction over Waring can not be established under Title 28, United States Code, Section 2281.

Finally, it is well established that Title 28, United States Code, Section 2201 is not intended to confer jurisdiction where none exists otherwise. The Section is limited in operation to those cases in which Federal jurisdiction exists to grant other relief and the mere fact that declaratory judgment is sought is not, of itself, ground for the exercise of Federal jurisdiction. In short, this Section is not a jurisdiction-conferring statute.[2] It merely adds an additional remedy and thus jurisdiction over the controversy and the parties must be found in other statutes which do confer jurisdiction. There existing no jurisdiction over codefendant Waring under the invoked jurisdictional statutes, as we have already shown, and Title 28, United States Code, Section 2201 not providing an independent jurisdictional basis, the action must be dismissed with respect to Waring.

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[2] See, e.g. *Barr* v. *U.S.*, 478 F.2d 1152 (10 Cir. 1973), cert. den. 414 U.S. 910 (1973); *Volkswagen de P.R., Inc.* v. *Puerto Rico Labor Relations Board*, 454 F.2d 38 (1 Cir. 1972); *Benson* v. *State Board of Parole and Probation*, 384 F.2d 238 (9 Cir. 1967), cert. den. 391 U.S. 954 (1968); *Continental Bank & Trust Co.* v. *Martin*, 303 F.2d 214, 112 U.S. App. D.C. 354 (1962).

The complaint must also be dismissed with respect to the Hon. Jose Trias Monge and the Hon. Ramon Negron Soto, Chief Justice of the Supreme Court and Administrative Director of Courts, respectively, of the Commonwealth of Puerto Rico. It is true that for purposes of Title 42, United States Code, Section 1983, these defendants are state officers and thus that, although as judges they are immune from damage suits under this statute when acting within the course and scope of their judicial duties, *Pierson* v. *Ray,* 386 U.S. 547 (1967), upon a showing of great, immediate and irreparable loss of plaintiff's constitutional rights as a consequence of their actions, injunctive relief under Section 1983 might conceivably be found warranted and within the scope of the Court. *Mitchum* v. *Foster,* 407 U.S. 546 (1971). However, even in the amended complaint there is no allegation of facts involving these defendants which could justify the granting of injunctive relief against them and, in fact, plaintiff does not even pray for such relief. Thus, upon plaintiff's own recitation of facts, there are no grounds upon which to grant any relief against the Hon. Jose Trias Monje and the Hon. Ramon Negron Soto pursuant to Title 42, United States Code, Section 1983.

Let us now examine if the allegations in the amended complaint do, nevertheless, suffice to establish jurisdiction over these defendants under Title 28, United States Code, Section 2281. With respect to the Hon. Jose Trias Monje, Chief Justice of the Supreme Court of Puerto Rico, the essential allegation was expressed as follows: "It is expressly alleged that he has the authority, by virtue of the Constitution, to issue orders to the rest of the judicial personnel of the system of courts of the Commonwealth of Puerto Rico to apply or not to apply Rule 56 of Civil Procedure or cause said Rule not to be applied in its un-

constitutional aspects." With respect to the Hon. Ramon Negron Soto, the only allegation is that as Court Administrator he has delegated authority from the Chief Justice of the Supreme Court "to perform the same acts, including the power to issue instructions to all Judges and Marshals not to grant or carry out attachment orders ex parte without hearing or notification." (See Paragraph 3A of the amended complaint).

These allegations are clearly insufficient to establish jurisdiction over these defendants under Section 2281. By its explicit terms, this Section embraces only those cases in which the enforcement, operation or execution of a state statute is sought to be prevented "by restraining the action" of state officers "in the enforcement or execution" of the state statute. It has thus long been held that before a state officer may properly be made a party defendant to a suit to enjoin the enforcement of a statute alleged to be unconstitutional, the action of said state officer must be the effective means of the enforcement or execution of the challenged statute. *Wilentz* v. *Sovereign Camp,* 306 U.S. 573 (1939). As we have already noted, there is no doubt that these defendants are state officers. But for purposes of Section 2281, what is decisive is not the formal status of the officials sued but, rather, the sphere of their functions regarding the matter in issue. *Rorick* v. *Board of Commissioners,* 307 U.S. 208 (1939). The issue then is whether either of these defendants, in his official capacity, is connected with the enforcement or execution of the challenged statute. As we will briefly show, neither of them is so connected.

The allegation that the Chief Justice of the Supreme Court of Puerto Rico has the constitutional authority to order that Rule 56 of Civil Procedure cease to be applied in the system of courts of Puerto Rico is clearly untenable. The explicit provisions of Section 6, Article V

of the Constitution of the Commonwealth of Puerto Rico [3] do not allow such an interpretation. In the first place, the constitutional power arising from this Section is vested on the Supreme Court as a body and not on the Chief Justice of the Court. In the second place, the Section charges the Supreme Court with adopting rules of evidence and of civil and criminal procedure but it provides that such rules can not go into effect if disapproved by the Legislative Assembly and further, that the Legislative Assembly shall have the power to amend, repeal or supplement any of said rules by specific legislation. It is clear therefore, and was so recognized in *Gonzales* v. *Superior Court; People, Int.*, 75 P.R.R. 550 (1953), that the Supreme Court does not have inherent rule making power in the field of judicial procedure and that its rule making power under Art. V, Section 6 is of a limited nature.

The provisions of Section 7, Article V of the Constitution [4] likewise provide no support for plaintiff's position.

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[3] "Article V, Section 6 [Rules of evidence and of civil and criminal procedure]

The Supreme Court shall adopt for the courts rules of evidence and of civil and criminal procedure which shall not abridge, enlarge or modify the substantive rights of the parties. The rules thus adopted shall be submitted to the Legislative Assembly at the beginning of its next regular session and shall not go into effect until sixty days after the close of said session, unless disapproved by the Legislative Assembly, which shall have the power both at said session and subsequently to amend, repeal or supplement any of said rules by a specific law to that effect."

[4] "Art. V, Section 7 [Rules of Administration; Chief Justice to direct administration and appoint administrative director]

The Supreme Court shall adopt rules for the administration of the courts. These rules shall be subject to the laws concerning procurement, personnel, audit and appropriation of funds, and other laws which apply generally to all branches of the government. The Chief Justice shall direct the administration of the courts and shall appoint an administrative director who shall hold office at the will of the Chief Justice.

This Section pertains to the rules of administration of the courts of the Commonwealth. The Supreme Court, once again as a body, is therein directed and empowered to adopt said rules of administration subject to the laws which apply to all other branches of the Government. Thus, although it is also provided that the Chief Justice shall direct the administration of courts and appoint an administrative director, there is simply no way in which this Section can be construed as providing the constitutional authority found lacking in the Section specifically concerned with procedural rules. The rule making power granted by the Section is collective in nature, subject specifically to the restrictions contained in all applicable Commonwealth legislation and limited to the area of court administration. The Section does not relate in any way to the rule making power of the Supreme Court in the area of procedural rules and vests no rule making authority of any kind on the Chief Justice.

We find, therefore, that the Chief Justice of the Supreme Court of Puerto Rico does not have the constitutional authority to order that Rule 56 of the Puerto Rico Rules of Civil Procedure cease to be applied partly or completely, in the judicial system of the Commonwealth. It follows from this that the Administrator of Courts of the Commonwealth can not, and does not, have any delegated authority from the Chief Justice in this respect and, specifically, to issue instructions to the judges and marshals of the judicial system not to grant or carry out attachment orders ex parte without hearing or notification.

It is equally clear that in their official capacities these two defendants do not act to bring Rule 56 into operation. The rule being the procedural means through which plaintiffs may obtain temporary remedies in the courts of the Commonwealth, the state officials which bring the statute into operation are the trial judges of its judicial

system. Neither the Chief Justice of the Supreme Court nor the Administrator of Courts are required to act in order that provisional remedies may be granted under Rule 56. Operation of the statute is entirely in the hands of the trial judges. In short, it is clear that the Hon. Jose Trias Monje as Chief Justice and the Hon. Ramon Negron Soto as Court Administrator, are state officers whose action is not the effective means of the enforcement or execution of the challenged statute. Since, therefore, enforcement or execution of the state statute can not be restrained by enjoining their action, jurisdiction over these defendants can not be established under Title 28, United States Code, Section 2281.[5] There being no jurisdiction over them under Title 28, United States Code, Section 1343 pursuant to Title 42, United States Code, Section 1983, and Title 28, United States Code, Section 2201 not being a jurisdictional statute, the complaint must be dismissed with respect to these defendants.

With respect to the remaining defendants, the Hon. Flavio E. Cumpiano and Mr. Nicolas Torres Renta, Judge and Marshal, respectively, of the Superior Court of Puerto Rico, San Juan Part, there is no doubt that they are persons who act "under color of law" for purposes of Title 42, United States Code, Section 1983 and hence jurisdiction over them can properly be established under Title 28, United States Code, Section 1343. However, plaintiff does not argue that these state officers have engaged in lawless or unconstitutional actions in the discharge of their official

[5] In addition to *Wilentz* v. *Sovereign Camp*, supra, and *Rorick* v. *Board of Commissioners*, supra, see also *Moody* v. *Flowers*, 387 U.S. 97 (1967); *Oklahoma Gas Co.* v. *Packing Co.*, 292 U.S. 386 (1934); *Ex Parte Public Bank*, 278 U.S. 96 (1928); *Ex Parte Young*, 209 U.S. 123 (1908); *Fitts* v. *McGee*, 172 U.S. 516 (1899); *McCrimmon* v. *Daley*, 418 F.2d 366 (7 Cir. 1969); *Thomas* v. *Burke*, 379 F. Supp. 231 (DC RI 1974); *Hobbs* v. *Tom Norton Motor Company*, 373 F. Supp. 956 (SD Fla. 1974); *Gibbs* v. *Titelman*, 369 F. Supp. 38 (ED Pa. 1973).

duties pursuant to a valid state statute. Plaintiff is challenging the statute itself as unconstitutional and in violation of the Fifth and Fourteenth Amendments of the Federal Constitution. The injunctive relief prayed for is therefore subject to the restrictions of Title 28, United States Code, Section 2281 and the crucial issue then becomes whether vel non, these remaining defendants are "state officers" for purposes of Section 2281.

It is clear to us that defendant Nicolas Torres Renta is not such a "state officer". Although a state employee, as marshal of the Superior Court he is not charged with the enforcement or execution of Rule 56 of the Puerto Rico Rules of Civil Procedure. His official duties are strictly ministerial and pursuant to judicial order. He does not exercise any discretionary powers under the statute and in fact does not have any duties at all to perform until a writ of attachment has been issued. His function is to execute the writ of attachment and he is therefore not involved in any way with the statute itself. Since restraining his actions does not restrain the operation of the challenged statute, he is not a "state officer" for purposes of Section 2281.

However, the above argument is not applicable to the last defendant, the Hon. Flavio E. Cumpiano. There is no doubt that as a judge of the Superior Court, he is a state official who acts pursuant to a state statute when granting an ex parte order of attachment pursuant to the provisions of Rule 56 of the Puerto Rico Rules of Civil Procedure. As such he is a "state officer" for purposes of Section 2281 and is therefore a proper party under said statute. However, there is one last procedural inquiry to be made, to wit, whether any indispensable parties have been left out of this action which must be joined before we may proceed to adjudicate the controversy and provide any relief found warranted. Specifically, the question is whether the Court

can entertain the case and provide injunctive relief under the provisions of Section 2281 when neither the Governor nor the Secretary of Justice of the Commonwealth have been made parties to the action.

Article IV, Section 4 of the Constitution of the Commonwealth of Puerto Rico establishes the powers and duties of the Governor of Puerto Rico. For purposes of the matter before us the pertinent provisions of this Section are the first and last ones, to wit: "The Governor shall execute the laws and cause them to be executed . . . He shall exercise the other powers and functions and discharge the other duties assigned to him by this Constitution or by law." Article IV, Section 5 provides in part that: "For the purpose of exercising executive power, the Governor shall be assisted by Secretaries whom he shall appoint with the advice and consent of the Senate." Title 3, Laws of Puerto Rico Annotated, Section 1a in turn provides that the Governor may delegate to any officer of the Executive Branch whose appointment requires approval by the Senate, or to any of the officers or employees of the Office of the Governor, "those functions and duties imposed upon him by law and whose delegation does not run counter to specific provisions of law or to the Constitution of the Commonwealth." It also provides that "Such delegation shall be in writing through a proclamation or administrative bulletin signed by the Governor."

With respect to the Secretary of Justice we note that the Department of Justice is one of the departments established by virtue of Article IV, Section 6 of the Constitution.[6] However, the Constitution does not establish the

[6] "Article VI, Section 6 [Executive departments]
Without prejudice to the power of the Legislative Assembly to create, reorganize and consolidate executive departments and to define their functions, the following departments are hereby established: State, Justice, Education, Health, Treasury, Labor, Agriculture and Commerce, and Public Works. Each of these executive departments shall be headed by a Secretary."

powers and duties of the Secretaries which are to head these departments and we must turn to Title 3, Laws of Puerto Rico Annotated, Section 72 to find the provisions pertinent to our inquiry. Said Section provides in part as follows: "The Secretary of Justice shall represent the Commonwealth of Puerto Rico . . . in all suits and proceedings . . . to which it is a party, and when requested by the Governor or any head of a department, he may also represent . . . any . . . officer . . . of the Commonwealth Government, suing or being sued in his official capacity: Provided, however, that public prosecutions for crime . . . may be instituted and conducted by the proper prosecuting attorney without special authority from the Secretary of Justice . . ." Noting that this statute was enacted as Section 64 of the Political Code of 1902 and was amended in 1952 to conform it to the Constitution, at which time "Attorney General" was changed to "Secretary of Justice", we find that in *People* v. *Arrillaga*, 30 P.R.R. 878 (1922), the Supreme Court of Puerto Rico held that within the executive branch of the Government, the Attorney General had charge of the administration of justice in Puerto Rico, although under the supervision and control of the Governor who was vested with the supreme executive power for the enforcement of the laws of Puerto Rico, while in *People* v. *Calero*, 68 P.R.R. 295 (1948), the Court held that a provision that another official should certify violations of law to the Attorney General did not exempt him from the duty imposed by Title 3, Laws of Puerto Rico Annotated, Section 72 to prosecute any offense against the laws on his own initiative.

In view of the above constitutional and statutory provisions defining the powers and duties of the Governor and Secretary of Justice of the Commonwealth of Puerto Rico we find that in the present action, neither of these officials is an indispensable or necessary party. The statute being

challenged does not require any action on the part of either of them for its operation or execution. As to its enforcement, it is clear that it not being a criminal statute, no action is required on the part of the Secretary of Justice to enforce its provisions. Therefore, the Secretary of Justice is not even a proper party for purposes of Title 2281 and, had he been brought as a defendant, the action would have had to be dismissed as to him.[7] Similarly, even though the Governor is constitutionally charged with executing the laws and causing them to be executed, it is our opinion that he can not be considered a proper party in this action. The statute under attack is a rule of judicial procedure and, given the constitutional separation of powers between the executive and judicial branches of the Commonwealth Government and the explicit procedure for the adoption, amendment and repeal of rules of evidence and procedure established in Art. V, Section 6 of the Constitution, there is no possible way in which the Governor of Puerto Rico can be considered to be charged with the enforcement of this particular enactment. Therefore, he is not a proper party for purposes of Section 2281.[8]

Having determined that the Hon. Flavio E. Cumpiano is a proper party defendant under Section 2281, in his official capacity as Judge of the Superior Court of Puerto Rico, San Juan Part, and that there is jursdiction over Nicolas Torres Renta in his capacity as marshal of said Court, we finally reach the merits of the case. Although

[7] In addition to *Ex Parte Young*, supra, and *McCrimmon* v. *Daley*, supra, see also *Todd* v. *Oklahoma State Democratic Central Committee*, 361 F. Supp. 491 (ND Okla. 1973); *Johnson* v. *Robinson*, 296 F. Supp. 1165 (ND Ill. 1967); affirmed 394 U.S. 847 (1969) as opposed to *Bradley* v. *Milliken*, 438 F.2d 897 (6 Cir. 1970); *James* v. *Almond*, 170 F. Supp. 331 (ED Va. 1959).

[8] See *Todd* v. *Oklahoma State Democratic Committee*, supra; *Committee For Public Ed. & Relig. Lib.* v. *Rockefeller*, 322 F. Supp. 678 (SD NY 1971); *Camacho* v. *Rogers*, 199 F. Supp. 155 (SD NY 1961).

the appropriateness of injunctive relief in the context of the case might be questioned, as there is apparently no need for further positive action on the part of either Judge Cumpiano or Marshal Renta at the present time, we will proceed to rule on the constitutionality of the challenged statute since the action is also one for declaratory relief under Title 28, United States Code, Section 2201 and even if a three judge court were found not to be required, this Court could still hear the case as a non-statutory three judge court in the interests of avoiding further delay in disposing the case.[9]

Upon careful consideration of the arguments advanced, the provisions of the statute and the applicable jurisprudence, this Court agrees fully with the opinion of the Supreme Court of Puerto Rico in *Ricardo Dominguez Talavera* v. *Tribunal Superior de Puerto Rico, Sala de San Juan, Hon. Osvaldo de la Luz Velez, Juez,* supra. For the reasons briefly outlined below we find that the provisions of Rule 56 of the Puerto Rico Rules of Civil Procedure[10] do satisfy the due process requirements of the

[9] See *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965); *O'Malley* v. *United States*, 128 F.2d 676 (8 Cir. 1942), reversed on other grounds 317 U.S. 412 (1943); *Tape Industries Association of America* v. *Younger*, 316 F. Supp. 340 (CD Cal. 1970).

[10] The statute reads as follows: "Rule 56. Temporary Remedies
56.1 General Principles
In every action, before or after entering judgment, on motion of the claimant, the court may make such temporary order as may be necessary to secure the effectiveness of the judgment. The court may order the attachment, garnishment, the prohibition to alienate, the claim and delivery of personal property, receivership, an order to do or desist from doing any specific act, or it may adopt any other measure which it may deem advisable, according to the circumstances of the case, regardless of whether according to the previous proceedings, the remedy is ancillary to an action or must be obtained by an independent action. In every case in which a temporary remedy is sought, the court shall consider the interests of all the parties and shall enter judgment as substantial justice may require.

Constitution of the United States. In our opinion, the Rule strikes a reasonable balance between the rights of plaintiffs and defendants in a context of strict judicial

56.2 Notice

No provisional remedy shall be granted, modified, set aside, nor shall any action be taken thereon without notice to the adverse party and a hearing, except as provided in Rules 56.4 and 56.5.

56.3 Bond

A temporary remedy may be granted without giving a bond if it appears from public or private documents signed before a person with authority to administer oaths that the obligation may be legally enforced, or if a remedy is sought after judgment is entered. In all other cases the court shall require a bond sufficient to secure all the damages caused to the defendant by reason of the remedy. A defendant or respondent may, however, retain the possession of the personal property attached by the plaintiff or claimant by posting a bond in such sum as the court may deem sufficient to secure the value of the property. The guaranteeing by the defendant of the sum attached shall render the attachment ineffective.—

56.4 Attachment or prohibition to alienate

If the requirements of Rule 56.3 have been met, the court shall issue, on motion ex parte of a claimant, an order of attachment or of prohibition to alienate. The attachment and prohibition to alienate real property shall be effected by recording them in the Registry of Property and notifying the defendant. In the case of personal property, the order shall be carried out by depositing the personal property in question in court or with the person designated by it under the claimant's responsibility.

56.5 Order to do or to desist from doing

No order shall be made under Rule 56 to do or to desist from doing any specific act without serving notice upon the adverse party, unless it appears clearly from specific facts supported by affidavit that the applicant will sustain irreparable injury, damage or loss before notice and hearing on the application. Such order ex parte shall be effective upon notice thereof. Any party affected thereby may at any time file a motion to modify or annul the order, and such motion shall be set for hearing at the earliest possible date but not later than 5 days after the filing thereof and shall have preference over all other matters. For the purposes of such hearing, a notice of 2 days to the party obtaining the order or a shorter notice allowed by the court shall be sufficient.

56.6 Receivers

No receiver shall be appointed unless it is shown no other temporary remedy would be effective to secure the effectiveness of the judgment. Unless otherwise ordered by the court a receiver shall proceed in accordance with the rules for the judicial administration of estates."

control and we can not conceive of a higher degree of protection to a defendant's rights than that provided by such control of the attachment procedures that may be invoked against him. This view is consistent with our understanding of the relevant U.S. Supreme Court cases of *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) and *North Georgia Finishing, Inc.* v. *Di Chem, Inc.*, supra, to the effect that the key element in any analysis of the constitutionality of an attachment procedure is the degree to which the state has kept control over its monopoly as legitimate force.

In *Sniadach* a garnishment procedure in which the clerk of the court issued a summons at the request of the creditor's lawyers and the latter, by serving the garnishee, set in motion the machinery whereby a creditor's wages were frozen until such time, if ever, that he could prevail on the merits in the action instituted against him, was declared unconstitutional. The Court however emphasized the special context of the case and made clear the importance it attached to those special circumstances in arriving at its determination when it stated:

> "Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600; *Ownbey* v. *Morgan*, 256 U.S. 94, 110-112; *Coffin Bros.* v. *Bennett*, 277 U.S. 29, 31. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts . . . In the context of this case, the question is whether the interim freezing of wages without a chance to be heard violates procedural due process.
>
> A procedural rule that may satisfy due process for attachments in general, see *McKay* v. *McInnes*, 279 U.S.

820, does not necessarily satisfy procedural due process in every case . . . We deal here with wages — a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process." 395 U.S. at 339-340.

In *Fuentes,* prejudgment replevin provisions under Florida and Pennsylvania law which allowed a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of ex parte application to a court clerk and the posting of a bond, with the sheriff then required to execute the writ by seizing the property, were likewise declared unconstitutional. Once more, however, the Court emphasized the special context in which it was considering the issue of procedural due process. Noting that the statutes were most commonly utilized by creditors to recover goods in the hands of debtors, the Court stated: "The issue is whether procedural due process in the context of these cases requires an opportunity to be heard *before* the Statute authorizes its agents to seize property in the possession of a person upon the application of another." 407 U.S. at page 80 (emphasis in the original).

Further, the Court did not hold that all seizures of property without prior notice or hearing are unconstitutional. It recognized that they may be valid in some circumstances and described them as follows:

> "There are extraordinary situations" that justify postponing notice and opportunity for a hearing. *Boddie* v. *Connecticut,* 401 U.S. at 379. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." (footnotes omitted).

In *Mitchell,* however, a Louisiana sequestration procedure which allowed a creditor to obtain, upon the authority of a judge, a writ of sequestration on his ex parte application without notice to the debtor or an opportunity for a hearing, was held constitutional. To be sure, the Court in its opininon distinguished its prior holding in *Fuentes,* stating, ". . . we are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case." 416 U.S. at 615. However, there is no doubt that its opinion actually overruled *Fuentes.* As pointed out in the dissenting opinion of Justice Stewart, concurred in by Justices Douglas and Marshall, the factors purportedly making for a different case in *Mitchell* had been explicitly rejected as a ground for a difference in decision in *Fuentes.* Thus, the dissenting judges were correct in stating: "In short, this case is constitutionally indistinguishable from *Fuentes* v. *Shevin,* and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent."

The Court in *Mitchell* hed that the Louisiana sequestration procedure effected a constitutional accommodation of the conflicting interests of the parties by providing for judicial control of the process from beginning to end, by protecting the debtor's interest in every way except to

allow him initial possession and by putting the property in the possession of the party best able to protect it pending trial on the merits. It pointed out that the requirements of due process of law do not mandate any particular form of procedure since due process is addressed to the protection of substantial rights and by its very nature negates the concept of inflexible procedures applicable to every possible situation,[11] and, further, that the usual rule where only property rights are involved has been that mere postponement of the judicial inquiry is not a denial of due process if the opportunity for ultimate judicial determination of liability is adequate.[12] 416 U.S. at 610-612. To emphasize the point the Court stressed that it had previously unanimously approved prejudicial attachment liens effected by creditors, without notice, hearing or judicial order seeing no due process infringement in allowing creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit against the alleged debtor. 416 U.S. at 613.

The thrust of *Mitchell* is thus that the test for constitutionality outlined in *Fuentes* was modified, if not completely replaced, by an emphasis on the need to balance the potential for harm to the defendant debtor with the interest in protecting creditor remedies in order to determine the actual need for particular procedural safeguards. In other words, that due process requirements can not be arrived at by focusing on the interests of the debtor to the exclusion of the interests of the creditor.

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[11] The Court cited to this effect *Stanley* v. *Illinois*, 405 U.S. 645, 650 (1972); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945) and *NLRB* v. *McKay Co.*, 304 U.S. 333, 351 (1938).

[12] The Court cited for this proposition *Phillips* v. *Commissioner*, 283 U.S. 589, 596-97 (1931) and referred to *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U.S. 611 (1905) and *Springer* v. *United States*, 102 U.S. 586 (1881).

Through the application of this "balancing test" we can harmonize the decisions in *Sniadach, Fuentes* and *Mitchell* and appreciate the importance of the context of the case in each one of them. Let us now consider the impact of the decision in *North Georgia.*

In this last case a Georgia Statute allowing the clerk of the court to issue a writ of attachment on the strength of an affidavit of the plaintiff, or his attorney, containing only conclusory allegations and the posting of a bond at least double the amount allegedly owed, was declared unconstitutional. However, in our view this decision does not overrule *Mitchell* and resuscitate *Fuentes* but rather, it brings into somewhat sharper focus that the Supreme Court approaches a determination of the requirements of due process in the context of the particular creditor-debtor conflict. The decision in *North Georgia* follows the balancing approach of *Mitchell* and establishes that the overriding consideration must be whether, in a manner consistent with the existence of meaningful creditor's remedies, the statute under attack minimizes the risk that the ex parte issuance of a writ will result in a wrongful or arbitrary deprivation of a debtor.

Explaining that in *Fuentes* the seizures had been held unconstitutional because they "had been carried out without notice and without opportunity for a hearing *or other safeguard against mistaken repossession.*" (emphasis ours), the Court went on to state:

> "The Georgia statute is vulnerable for the same reasons. Here, a bank account . . . was impounded, and, absent a bond, put totally beyond use during the pending of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation of a judicial officer.
>
> Nor is the statute saved by the more recent decision in *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974).

That case upheld the Louisiana sequestration statute which permitted the seller-creditor . . . to secure a writ of sequestration and, having filed a bond, to cause the sheriff to take possession of the property at issue. *The writ, however, was issuable only by a judge upon the filing of an affidavit . . . clearly setting out the facts entitling the creditor to sequestration.* The Louisiana law also . . . entitled the debtor to an immediate hearing upon seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued.

The Georgia garnishment statute has none of the saving characteristics of the Louisiana statute. The *writ* of garnishment *is issuable on the affidavit of the creditor or his attorney,* and the latter need not have personal knowledge of the facts . . . *The affidavit . . . need contain only conclusory allegations. The writ is issuable . . . by the court clerk, without participation of a judge* . . . the only method discernible . . . . on the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing . . . Indeed, *it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be.*" (emphasis ours).

In its concurring opinion, Mr. Justice Powell pointed out that under Georgia law, garnishment was a separate proceeding between the garnishor and the garnishee and the debtor, not being a party, could intervene only by filing a dissolution bond and substituting himself for the garnishee. Further, the Georgia statute contained no provision enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of fact nor any requirement that the garnishor need prove entitlement to the garnishment.

In the context of *North Georgia*, it is clear to us that the *Mitchell* "balancing test" was sufficient to establish the unconstitutionality of the Georgia statute. Further, our reading of the case is that notwithstanding the expressed reliance on *Fuentes,* the Court actually followed the *Mitchell* "balancing test" approach in its analysis of the statute. We therefore agree with Justice Powell's statement to the effect that: "Pregarnishment notice and a prior hearing have not been constitutionally mandated in the past. Despite the ambiguity engendered by the Court's reliance on *Fuentes,* I do not interpret its opinion today as imposing these requirements for the future."

Considering the *Sniadach, Fuentes, Mitchell* and *North Georgia* sequence as a coherent group of decisions we can then summarize the framework which the Supreme Court has thereby constructed for the analysis of a prejudgment attachment statute as follows: The requirements of due process in the particular context must be established considering both the potential harm to the defendant debtor as well as the legitimate interests of the plaintiff creditor. The statutory procedure is then evaluated to determine its constitutionality in terms of the need for the seizure, the need for prompt action and, most important of all, the degree of control which the state has kept over its monopoly of legitimate force. Thus, the key constitutional consideration is clearly whether or not there is judicial supervision of the prejudgment attachment process so that a debtor is not simply left at the mercy of his creditor and court functionaries charged with ministerial duties. In order to assure that ex parte seizure is based upon legal and factual reason, and not merely on the request of a creditor, a creditor's position should be examined by a judge and authorized only upon his summary determination of the relative rights involved.[13]

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[13] In addition to the cases discussed see also *Hutchinson* v. *Bank of North Carolina,* 392 F. Supp. 888 (MD N.C. 1975); *Jonnet* v. *Dollar Savings Bank of the City of New York,* 392 F. Supp. 1385 (WD Pa. 1975).

Under this analytical framework, the constitutionality of Rule 56 of the Puerto Rico Rules of Civil Procedure is readily apparent. The statute establishes in Rule 56.2 the norm that no provisional remedy shall be granted, modified or set aside without prior notice to the other party and a hearing. As an exception to this general rule, a writ of attachment may be obtained ex parte under the provisions of Rule 56.4. However, unless the plaintiff provides the documentary evidence sufficient to establish that the obligation may be legally enforced, Rule 53.3 establishes that the writ can not be issued until said plaintiff furnishes a bond sufficient to secure all the damages that may be caused to the defendant by reason of the remedy. The provisions of Rule 53.3 further establish that the defendant may retain the possession of the personal property so attached by posting a bond sufficient to secure the value of the property. Finally, and the crucial feature, the statute insures strict judicial control of the attachment procedure. Under Rule 56 a plaintiff desiring to secure the effectiveness of a future judgment can not obtain a writ of attachment except through a motion to the Court to that effect. Only a judge can grant his request for such provisional remedy. Even if the motion is filed concurrently with the complaint, it is clear that a writ of attachment will therefore be based upon legal and factual reason and issued only after a judge has made a summary determination of the relative rights involved. Further, the defendant in any event is entitled to a post seizure hearing, in which he can question the whole procedure and reduce to a minimum any unwarranted deprivation of property, if any there be.

In short, we do not perceive any constitutional infirmity in the challenged statute. In our opinion Rule 56 of the Puerto Rico Rules of Civil Procedure achieves a reasonable accommodation of the adverse interests of the parties involved. Under its provisions, no plaintiff can enlist the

confiscatory power of the Commonwealth on his behalf on the strength of an unexamined application to an officer whose function is merely ministerial. The Rule insures judicial determination of the need for the attachment and for prompt action to execute it before an ex parte order may be obtained by a plaintiff. The interests of the defendant are further protected by the bond which the plaintiff is required to post, by the provision that the attachment can be rendered ineffective upon the guaranteeing by defendant of the sum attached and by the right to a post attachment hearing. Finally, the granting of a writ of attachment as a temporary remedy under Rule 56 is subject to the general principle tersely expressed in the last sentence of Rule 56.1 which states: "In every case in which a temporary remedy is sought, the Court shall consider the interests of all the parties and shall enter judgment as substantial justice may require." [14]

In view of all of the above, we find that Rule 56 of the Puerto Rico Rules of Civil Procedure satisfies the constitutional requirements of due process and that plaintiff is not entitled to the prayed for relief. The Complaint is therefore hereby dismissed and the Clerk of the Court instructed to enter judgment accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico.

(s) EDWARD M. MCENTEE
EDWARD M. MCENTEE
Circuit Judge

(s) JOSE V. TOLEDO
JOSE V. TOLEDO
District Judge

(s) JUAN R. TORRUELLA
JUAN R. TORRUELLA
District Judge

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[14] See also in this respect *Freeman* v. *Superior Court*, 92 P.R.R. 1 (1965) at page 25.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 960-73

BALZAC BROTHERS, INC.
PLAINTIFF
v.
WARING PRODUCTS DIVISION OF DYNAMICS COMPANY OF AMERICA, et al.
DEFENDANTS

JUDGMENT

This Court having come for a full final hearing before a Three-Judge Court, Judges McEntee, Toledo and Torruella sitting, and the issues having been heard and the Opinion of the Court having been duly rendered

It is ORDERED and ADJUDGED and DECREED that Rule 56 of the Puerto Rico Rules of Civil Procedure satisfies the constitutional requirements of due process and that plaintiff is not entitled to the relief prayed for and

it is further ORDERED, ADJUDGED and DECREED that this complaint be dismissed.

SO ORDERED.
San Juan, Puerto Rico, February 9, 1976.

DENNIS A. SIMONPIETRI
Clerk
U.S. District Court
By: (s) RAMON A. ALFARO
RAMON A. ALFARO
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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BALZAC BROTHERS, INC.
PLAINTIFF
v.
WARING PRODUCTS DIVISION OF DYNAMICS COMPANY OF AMERICA, et al.
DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the plaintiff, Balzac Brothers, Inc. hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C., Sections 1253 and 2101 from the judgment of the three-judge court entered in this action on February 9, 1976 dismissing the complaint.

Plaintiff also appeals from the order dated November 25, 1975 issued by Judge Jose V. Toledo, Chief U.S. District Judge, denying the certification of the action as a class action.

In San Juan, Puerto Rico this 17th day of February 1976.

I HEREBY CERTIFY that on this same date I have sent copies of this notice of appeal to attorneys Maria Josefa Fornaris, Teachers Association Building, Suite 408-409 Hato Rey, Puerto Rico and Roberto Armstrong, Jr., Justice Department, Box 192, San Juan, Puerto Rico 00902.

(s) A. J. AMADEO MURGA
A. J. AMADEO MURGA
512 San Alberto Condominium
605 Condado Avenue
Santurce, Puerto Rico 00907

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 74-1356

BALZAC BROTHERS, INC.,
PLAINTIFFS, APPELLANT,
v.
WARING PRODUCTS DIVISION OF DYNAMICS COMPANY OF AMERICA, et al.,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

A. J. Amadeo Murga, with whom *Amadeo & Oliveras* was on brief, for appellant.

Maria Josefa Fornaris for Waring Products Division Dynamics Company of America, appellee.

Roberto Armstrong, Jr., Assistant Solicitor General, with whom *Miriam Naveira De Rodon*, Solicitor General, was on brief, for Honorable Flavio E. Cumpiano et al., appellees.

March 3, 1975

PER CURIAM. Appellee sought to collect a sum of almost $10,000 from appellant for merchandise delivered. It initiated suit in superior court on September 7, 1973, serving notice on appellant on October 1. Appellant asked an extension of time to answer and served interrogatories. On October 31, appellee proceeded to invoke the procedures of Rule 56, Puerto Rico Rules of Civil Procedure, allowing a claimant, before judgment, on posting bond and designating a custodian, to obtain an order of attachment of

goods or other personal property of the defendant to secure the effectiveness of any judgment ultimately obtained. When a marshal appeared at appellant's place of business to execute the attachment, appellant obtained a loan from a bank and deposited with the marshal a check for some $12,000, thus avoiding seizure of its goods.

The district court first ruled that Rule 56 was so clearly unconstitutional, under *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), that no three-judge court was required. Subsequently, after the decision in *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974), the court decided that no three-judge court was required because Rule 56 was so clearly constitutional and dismissed the complaint, seeking injunctive relief, on the merits. Unfortunately, for the progress of this litigation, what the district court took to be a juridical weather vane continued its movement and, subsequent to the district court's decision, *North Georgia Finishing, Inc.* v. *Di Chem, Inc.*, — U.S. —, 43 U.S.L.W. 4192 (Jan. 22, 1975), was decided. This case also involved a pre-judgment general attachment of goods for security in a commercial setting. While we do not exercise any judgment on the merits, it is at least now clear that the complaint presents a substantial issue. Under *Goosby* v. *Osser*, 409 U.S. 512 (1973), a three-judge court is required.

Appellee has argued that, since goods in fact were not seized, appellant having deposited its check as substitute security, there was no possibility of deprivation of property without due process. But appellant's credit, if not its goods, has been encumbered to the full extent of the order of attachment. In any event this issue is best left to the three-judge court. Finally, it has been suggested that we certify any constitutional question to the Supreme Court of Puerto Rico. Again, this would be a matter for consideration by the three-judge court.

Accordingly, the judgment is vacated and the cause remanded to the District Court for the constituting of a three-judge court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 802-73

GLADYS RAMIREZ DE ARELLANO,
PLAINTIFF,
v.
FIRST NATIONAL CITY BANK, et al.,
DEFENDANTS.

Civil No. 745-73

BLANCA CARLINA HERRERO MARRERO,
PLAINTIFF,
v.
FIRST NATIONAL CITY BANK, et al.,
DEFENDANTS.

Civil No. 960-73

BALZAC BROTHERS, INC.,
PLAINTIFF,
v.
WARING PRODUCTS DIVISION DYNAMICS COMPANY
OF AMERICA, et al.,
DEFENDANTS.

Civil No. 910-73

ABIMAEL HERNANDEZ, et al.,
PLAINTIFFS,
v.
HON. FRANCISCO ESPINOSA, et al.,
DEFENDANTS.

OPINION AND ORDER

In response to this Court's verbal Order of July 19, 1974, that the parties herein discuss the impact on the

instant cases of *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Mitchell* v. *Grant*, 42 L.W. 4671 (1974), plaintiffs filed memoranda of law and argue that the ruling of *Grant* should not apply to Rule 56 of the Commonwealth Rules of Civil Procedure[1] because that case deals with an attach-

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[1] Rule 56 of the Commonwealth Rules of Civil Procedure reads as follows:

"'In every action, before or after entering judgment, on motion of the claimant, the court may make such temporary order as may be necessary to secure the effectiveness of the judgment. The court may order the attachment, garnishment, the prohibition to alienate, the claim and delivery of personal property, receivership, an order to do or desist from doing any specific act, or it may adopt any other measure which it may deem advisable, according to the circumstances of the case, regardless of whether according to the previous proceedings, the remedy is ancillary to an action or must be obtained by an independent action. In every case in which a temporary remedy is sought, the court shall consider the interests of all the parties and shall enter judgment as substantial justice may require.

No provisional remedy shall be granted, modified, set aside, nor shall any action be taken thereon without notice to the adverse party and a hearing, except as provided in Rules 56.4 and 56.5.

A temporary remedy may be granted without giving a bond if it appears from public or private documents signed before a person with authority to administer oaths that the obligation may be legally enforced, or if a remedy is sought after judgment is entered. In all other cases the court shall require a bond sufficient to secure all the damages caused to the defendant by reason of the remedy. A defendant or respondent may, however, retain the possession of the personal property attached by the plaintiff or claimant by posting a bond in such sum as the court may deem sufficient to secure the value of the property. The guaranteeing by the defendant of the sum attached shall render the attachment ineffective.— Amended Jan. 24, 1961, eff. July 31, 1961.

If the requirements of Rule 56.3 have been met, the court shall issue, on motion ex parte of a claimant, an order of attachment or of prohibition to alienate. The attachment and prohibition to alienate real property shall be effected by recording them in the Registry of Property and notifying the defendant. In the case of personal property, the order shall be carried out by depositing the personal property in question in court or with the person designated by it under the claimant's responsibility.

No order shall be made under Rule 56 to do or to desist from doing any specific act without serving notice upon the adverse party, unless it appears clearly from specific facts supported by

ment procedure designed to protect competing ownership rights over the property attached while Rule 56 deals with property belonging exclusively to the debtor. As such, *Fuentes*—requiring pre-attachment notice and hearing—is still operative with regard to Rule 56.

Plaintiffs, however, have not focused on the factor that distinguishes *Grant* from *Fuentes* and allows both decisions to stand. True, emphasis is made in *Grant* that an interpretation of the Louisiana sequestration statute under attack had to include recognition of the creditors alleged ownership rights, but the property attached by way of replevin in *Fuentes* did not belong exclusively to the debtor either. Constitutionality of attachment statutes, then, depends not on degree of ownership, but on the extent of pre-attachment protection, short of notice and hearing, statutorily afforded the debtor whose property is attached ex parte. Such protection was found lacking in *Fuentes*, and was considered sufficient for due process purposes in *Grant*. Inasmuch as the protection afforded the debtor by Rule 56 is much like the protection found sufficient in *Grant*. Rule 56 is constitutional, and these actions should be and are hereby dismissed. The actions in Civil No. 802-73 and 745-73, which are damage actions and were consolidated with Civil 910-73 and 960-73 for consideration of the con-

affidavit that the applicant will sustain irreparable injury, damage or loss before notice and hearing on the application. Such order ex parte shall be effective upon notice thereof. Any party affected thereby may at any time file a motion to modify or annul the order, and such motion shall be set for hearing at the earliest possible date but not later than 5 days after the filing thereof and shall have preference over all other matters. For the purposes of such hearing, a notice of 2 days to the party obtaining the order or a shorter notice allowed by the court shall be sufficient.

No receiver shall be appointed unless it is shown no other temporary remedy would be effective to secure the effectiveness of the judgment. Unless otherwise ordered by the court a receiver shall proceed in accordance with the rules for the judicial administration of estates."

stitutional questions will be returned to the Honorable Judge Hernan G. Pesquera for his future handling.

A judgment will be entered accordingly.

San Juan, Puerto Rico, August 23, 1974.

JOSE V. TOLEDO
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 802-73

GLADYS RAMIREZ DE ARELLANO,
PLAINTIFF,
v.
FIRST NATIONAL CITY BANK, et al.,
DEFENDANTS.

Civil No. 745-73

BLANCA CARLINA HERRERO MARRERO,
PLAINTIFF,
v.
FIRST NATIONAL CITY BANK, et al.,
DEFENDANTS.

Civil No. 960-73

BALZAC BROTHERS, INC.,
PLAINTIFF,
v.
WARING PRODUCTS DIVISION DYNAMICS COMPANY
OF AMERICA, et al.,
DEFENDANTS.

Civil No. 910-73

ABIMAEL HERNANDEZ, et al.,
PLAINTIFFS,
v.
HON. FRANCISCO ESPINOSA, et al.,
DEFENDANTS.

JUDGMENT

In view of our Opinion in this action, Rule 56 is hereby found constitutional and these actions are hereby dismissed.

The actions in Civil 802-73 and 745-73, which are damage actions, and were consolidated with Civil 910-73 and Civil 960-73 for consideration of the constitutional questions will be returned to the Honorable Judge Hernan G. Pesquera for his future handling.

IT IS SO ORDERED.

San Juan, Puerto Rico, August 23, 1974.

JOSE V. TOLEDO
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 910-73

ABIMAEL HERNANDEZ, et al.,
PLAINTIFFS,
v.
HON. FRANCISCO ESPINOSA ROBLEDO, et al.,
DEFENDANTS.

Civil No. 960-73

BALZAC BROTHERS, INC.,
PLAINTIFFS,
v.
WARING PRODUCTS DIVISION DYNAMICS COMPANY OF AMERICA, et al.,
DEFENDANTS.

OPINION AND ORDER

These causes under Title 42, United States Code, Section 1983 and Title 28, United States Code, Section 2281, are before this Court on plaintiffs' amended complaints wherein, among other things, it is requested that this Court orders that a three judge court be convened pursuant to Title 28, United States Code, Section 2284, to entertain plaintiffs' charges that Rule 56.4 of the Rules of Civil Procedure for the Commonwealth of Puerto Rico is repugnant to the due process clauses of the Constitution of the United States. Interlocutory and permanent relief are prayed.

Motions to dismiss the complaints have been filed by the defendants in each case. The mentioned motions are basically addressed to the jurisdiction of this Court to entertain plaintiffs' actions under Title 42, United States Code, Section 1983 and Title 28, United States Code, Section 2281.

They basically assert exhaustion of state remedies and abstention principles, as well as a failure to show that some defendants acted under color of state law (See Civil No. 910-73). In Civil No. 910-73 a failure to join an indispensable party charge is also raised.

At the stage these causes are before this Court, the only inquiry we have to make is whether the requirements of Section 2281 of Title 28, United States Code are met. See *Marin* v. *University of Puerto Rico* (D.C.P.R. 1972), 346 F. Supp. 470, 481-483 and *Suarez* v. *Administrador del Deporte Hipico de Puerto Rico* (D.C.P.R. 1972), 354 F. Supp. 320, 323-325.

It is our opinion that plaintiffs have asserted a cause under Section 2281 of Title 28, United States Code, but that their cause need not go before a court of three judges. When the Supreme Court of the United States and the Court of Appeals for the First Circuit have amply considered the issues raised before this Court, the need to convene a three judge court disappears. It is our opinion that the issues raised in the present causes have been made insubstantial, see *Hannis Distilling Company* v. *Baltimore*, 216 U.S. 285, 288 (1910) and *Ex Parte Poresky*, 290 U.S. 30, 32 (1933), by the Supreme Court decisions in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (196) and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and by the decisions entered in *Gunter* v. *Merchants Warren National Bank*, Civil 13-117 and *Lake Arrowhead Estates, Inc.* v. *Cumming*, — F. Supp. — (District Court of Maine) (three-judge court opinion of June 25, 1973, dealing with a prejudgment attachment of real estate); *Bay State Harness Horse Racing & Breeding Association, Inc.* v. *P.P.G. Industries, Inc.*, Civil 72-2178-M and *Englander* v. *Breitstein*, Civil 72-3460-M, — F. Supp. — (District Court of Massachusetts) (three-judge court opinion of August 7, 1973, dealing with prejudgment attachment of real estate); and *Schneider* v. *Margosian* (District

Court of Massachusetts 1972), 349 F. Supp. 741 (three-judge court opinion dealing with a prejudgment attachment of a bank account).

Accordingly, it is this Court's opinion that this case should be heard before a one-judge court; and that all arguments in relation to this Court's jurisdiction, other than the one at present disposed of, as well as all arguments in relation to the merits of the causes must be directed to the one-judge court which is to hear the cause.

Having the today-being-disposed of issue being submitted for several weeks and there appearing that plaintiffs have requested interlocutory relief in their amended complaints, the Court deems convenient to have the parties appear before it for a conference in chambers to discuss the necessity and appropriateness of such relief. The future disposition of this cause will also be an element of discussion at such conference.

In view of the foregoing, the Court hereby ORDERS that these causes be heard by a single Judge, and it further

ORDERS that the defendant file their answer to the complaints within the next ten (10) days, after the docketing of this Order; and it is further

ORDERED that the defendants raise before the single judge court to hear the causes any and all arguments in relation to the jurisdiction of the Court under plaintiffs' asserted statutes, as well as the arguments as to the merits of this cause, by way of motion and memorandum; and it is further

ORDERED that the parties appear before this Court on Friday, February 8, 1974 at 2:30 p.m. for a conference in chambers in relation to the future disposition of this cause.

San Juan, Puerto Rico, January 29, 1974.

(s) JOSE V. TOLEDO
JOSE V. TOLEDO
U.S. District Judge